

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

DAVID E. WISHOWSKY,)
)
 Employee/Grievant,)
)
 v.)
)
 DEPARTMENT OF CORRECTION,)
)
 Employer/Respondent.)

**DOCKET No. 09-04-448
DECISION AND ORDER**

After due notice of time and place this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on February 4, 2010 at the Delaware Public Service Commission, Silver Lake Plaza, Canon Building, PSC Conference Room, 861 Silver Lake Boulevard, Dover DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Joseph D. Dillon, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under *29 Del. C. §5908(a)*.

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

David E. Wishowsky
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Correction

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, David E. Wishowsky (Wishowsky), offered fourteen exhibits into evidence. The Board admitted ten as Exhibits 1-8, 13, and 14. The Board excluded four exhibits for reasons stated in the Pre-Hearing Order.

The Department of Correction (DOC) offered eleven exhibits into evidence. The Board admitted them as Exhibits A-K.

Wishowsky testified on his own behalf and called one witnesses: Laurie Pezick.¹

FINDINGS OF FACT

The DOC hired Wishowsky as a Probation Officer 1 in April 2002. Wishowsky did not have a master's degree or any prior probation or parole experience but was a Delaware State Trooper for twenty-two years. Wishowsky did not request an advanced starting salary based on his prior police experience.

In 2004 the DOC promoted Wishowsky to Probation Officer 2. He requested an advanced starting salary of 10% based on his prior police experience (5%) and a master's degree in community counseling he received in 2003 (5%). The DOC denied his request for an advanced starting salary.

Wishowsky grieved all the way to the Board. The Board denied Wishowsky's appeal. *Wishowsky v. Department of Correction*, MERB Docket No. 05-

¹ In the Pre-Hearing Order the Chair excluded one of Wishowsky's proposed witnesses, Alan Kerrigan, based on the recommendation of the Referee. Wishowsky asked for reconsideration of the Chair's decision to exclude Kerrigan's testimony. By letter dated February 1, 2010 the Chair notified Wishowsky that the full Board would re-consider the issue as a preliminary matter at the hearing. The full Board ruled that Kerrigan's proffered testimony was not relevant and was excluded.

10-340 (July 19, 2007). The evidence in the record proved that the DOC consistently applied two criteria for an advanced starting salary: probation officer experience and a master's degree in criminal justice. The Board found that two of Wishowsky's three comparators "had, in fact, received an advanced starting salary and possessed the two criteria at the time of their hire." The third comparator did not receive an advanced starting salary at the time of hire.

In 2006 the DOC promoted Wishowsky to Senior Probation Officer. This was a career ladder promotion for which Wishowsky did not have to compete. He was eligible for the promotion one year earlier than an officer with a bachelor's degree because he had earned a master's degree in community counseling. Wishowsky requested an advanced starting salary based on his prior police experience (5%) and based on his master's degree in community counseling (5%). The DOC denied his request for an advanced starting salary.

Wishowsky again grieved all the way to the Board. At the hearing Laurie Pezick, Wishowsky's supervisor in the Sex Crimes Unit, testified that he was an excellent probation officer and one of only two employees (in eleven years) she had given an exceeds expectations performance evaluation. Ms. Pezick testified that she believed Wishowsky's prior police experience and master's degree in community counseling benefitted the DOC. Ms. Pezick testified that she was not aware of any officer promoted to Senior Probation Officer who had received an advanced starting salary.

In the pre-hearing conference the DOC proffered three comparators to show that it exercised its discretion consistently in denying requests for an advanced starting salary on promotion to Senior Probation Officer: Diana DeBenedictis; Ryan Hurd; and Georgiana

Staley. At the hearing, Wishowsky acknowledged that all three had a master's degree in counseling rather than a master's degree in criminal justice.

Wishowsky cited as comparators Roger Tanner and Tracey Lewis. When the DOC hired Tanner and Lewis as a Probation Officer 1 they received an advanced starting salary because both had prior probation officer experience and a master's degree in criminal justice. Wishowsky acknowledged that Tanner and Lewis were the same comparators he cited in his previous appeal to the Board.

CONCLUSIONS OF LAW

Merit Rule 4.4.2 provides:

Agencies may approve a starting rate of up to 85% of midpoint where applicants' qualifications are clearly over and above the job requirements as stated in the class specification. Upon agency request, the Director may approve a starting rate higher than the 85th percentile if supported by documentation of the applicant's qualifications.

Merit Rule 4.6 provides:

Promotion. Upon promotion, employees shall receive either the minimum salary of the higher paygrade or an increase of 5%, whichever is greater. Agencies may grant a greater increase not to exceed the 85th percentile criteria in 4.2.2. The Director may approve a greater increase that exceeds the 85th percentile under the criteria in 4.2.2.

When Wishowsky rested his case the DOC moved for dismissal on the ground that he had failed to meet his burden of proof. After deliberating, the Board granted the

DOC's motion to dismiss.²

Under the Merit Rules the employing agency has discretion (“**may**”) to approve an advanced starting salary “if supported by documentation of the [employee’s] qualifications.” The Board concludes as a matter of law that Wishowsky did not meet his burden to prove that the DOC abused its discretion in denying his request for an advanced starting salary when the DOC promoted him to Senior Probation Officer in 2006.

Wishowsky did not provide the Board with any evidence that the DOC approved an advanced starting salary for a similarly situated employee. Wishowsky’s only alleged comparators were Roger Tanner and Tracy Lewis. Tanner and Lewis are not valid comparators for two reasons. First, DOC approved their advanced starting salaries upon initial hire as a Probation Officer 1, not upon promotion to Senior Probation Officer. Second, Tanner and Lewis both had prior probation officer experience and a master’s degree in criminal justice.

Wishowsky believes that his 22-years’ experience as a police officer should count as much as prior probation experience, and that a master’s degree in counseling benefits the DOC just as much as a master’s degree in criminal justice. Under the Merit Rules, however, the agency has discretion to select the criteria to use to approve an advanced starting salary. The Board does not believe that the DOC abused its discretion by

² “The Administrative Procedures Act gives the Board broad authority to conduct its hearings. See 29 Del. C. §10125. The Board believes that includes the authority to dismiss an appeal after a grievant presents his or her case for failure to prove by a preponderance of the evidence a violation of the Merit statutes or the Merit Rules or regulations.” *Christman v. DHSS*, MERB Docket No. 04-06-307, at p.4 (May 28, 2008).

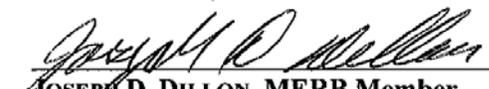
selecting the criteria that it did: prior probation officer experience and a master's degree in criminal justice. Wishowsky did not present the Board with any evidence that the DOC did not consistently apply those criteria to other employees promoted to Senior Probation Officer.

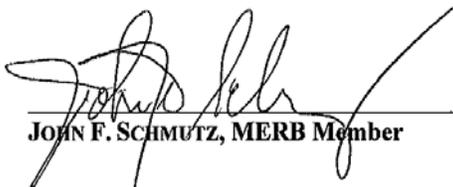
The Board concludes as a matter of law that Wishowsky did not meet his burden to prove that the DOC violated Merit Rule 4.6 by denying him an advanced starting salary when the DOC promoted him to Senior Probation Officer. Wishowsky did not offer any evidence to prove that the DOC abused its discretion by granting an advanced starting salary to a similarly situated officer.

ORDER

It is this 17th day of February , 2010, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Wishowsky's's appeal.


MARTHA AUSTIN, MERB Member


JOSEPH D. DILLON, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


Jacqueline Jenkins
Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: February 17, 2010

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

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